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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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I.

Opinions of Court Below.

The opinions of the Court of Appeals for the Seventh Circuit are reported in 114 F. (2d) 873 (Advance Sheets of November 25, 1940). The first opinion filed on April 12, 1940 is copied in the Record, pp. 735-745, and the additional opinion on the petition for rehearing appears in the Record, pp. 813-817. The dissent of Judge Treanor appears at page 817 of the Record.

II.

Statement of the Case.

This statement has been made in the petition for certiorari filed herewith at pages 1-13, and in the interest of brevity will not be repeated in this brief.

The statement disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment of the Court of Appeals for the Seventh Circuit, has been made in the petition for certiorari at pages 13 and 14 thereof, pursuant to Rule 38(2) of this Court.

III.

Specification of Errors.

1. The Court of Appeals for the Seventh Circuit erred in sustaining the admission of the testimony of the respondent's medical examiner, Eli Rubens, contradicting the fact, certified by him in the application which was attached to and made a part of the policies in suit, that he saw the applicant sign said application.

2. The Court of Appeals erred in not holding that said testimony of respondent's medical examiner was inadmissible under Illinois law to impeach and contradict statements in documents introduced in evidence by the respondent.

3. The Court of Appeals erred in sustaining the Conclusion of Law entered by the District Court that the incontestable clause in the policies in suit did not preclude the defense that the person examined by the respondent's medical examiner was not Frank Obartuch.

4. The Court of Appeals erred in sustaining the District Court's refusal to hold as a Conclusion of Law that the defense of fraud, including that of substitution of another

person for the insured at the medical examination, was barred by the incontestable clause of the policies under the law of Illinois.

5. The Court of Appeals erred in failing to hold that the record showed that respondent, by its counsel, waived all defenses, including any question as to the signatures of Frank Obartuch on the application, by submitting for trial the sole defense of substitution at the medical examination.

IV.

Summary of Argument.

1. The testimony of the medical examiner Rubens that the person examined by him did not sign the medical questions and answers, Part 2 of the application, in his presence, contradicted Rubens' certificate to that effect in the application, which was attached to and expressly made a part of the policies sued on. The admission of such testimony, sustained by the Court of Appeals, was erroneous, for the parol evidence rule was applicable thereto, as decided by the Fifth Circuit Court of Appeals in *New York Life Ins. Co.* v. *Stewart*, 69 F. (2d) 957. This conflict should be resolved.

2. This testimony contradicted and impeached not only the statement of Rubens in Part 2 of the application introduced by respondent in evidence, but also Rubens' statements in Part 3, which likewise was offered by respondent and received in evidence as its exhibit. Under the decisions of the Supreme Court of Illinois such testimony was incompetent on behalf of the respondent. The law of Illinois, thus announced, should have been applied by the courts below, under the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

3. The sole defense presented for trial by respondent

was the alleged substitution of another person for Frank Obartuch at the medical examination. Under the law of Illinois, this defense of alleged fraudulent procurement of the policies in suit, was barred by the incontestable clause of the policies.

4. The holding of the Court of Appeals that there was no contract in existence to which the incontestable clause would apply was predicated on cases where the imposter not only took the medical examination but also signed the application in another's name. In the instant case, the policies were issued upon an application signed by Frank Obartuch, the insured named therein.

V.

ARGUMENT.

A. The Testimony of the Examiner Rubens Contradicting His Written Statement in the Policies in Suit Was Inadmissible (a) Under the Parol Evidence Rule and (b) Under the Law of Illinois That a Party is Concluded by Documents Introduced as its Evidence.

The judgment of the District Court for the respondent was predicated upon the finding that some person other than Frank Obartuch, the insured, submitted to a medical examination by Dr. Rubens, the respondent's examiner (R. 711). The decision of the District Court rendered orally at the conclusion of the trial dealt solely with that question of fact. This finding necessarily rested upon the testimony of Rubens, who was the only person present at said examination to testify that Frank Obartuch was not the person he examined. The Court gave credence to such testimony, although Rubens saw the person examined only at the examination (R. 134) and his testimony consisted of a denial that a picture of Frank Obartuch shown to him at the trial was that of the man he had examined nearly eight years previous thereto (R. 113).

Rubens was permitted to testify that he did not see the person he examined attach his signature to the medical questions and answers, Part 2 of the application attached to and by the provisions of the incontestable clause made a part of the policies in suit. This was the vital point of the defense of substitution, for the respondent was unable to dispute the fact that said application bore the genuine signature of Frank Obartuch. If, therefore, the respondent is concluded by Rubens' signed declaration in the policy

that he saw Frank Obartuch attach his signature to the application after he had reviewed the answers to the medical questions with Frank Obartuch, as we contend that the respondent is so concluded by law, the entire defense of an alleged substitution for Frank Obartuch at the medical examination collapses.

The Court of Appeals held that the Parol Evidence Rule was inapplicable to exclude Rubens' testimony. In its first opinion, the Court based its conclusion on the ground that the defense was fraud which rendered the contract void *ab initio* (R. 743). After the reargument on the petition for rehearing, the Court in effect conceded that the admission of this testimony could be sustained only by showing that Rubens' signature to his declaration in the application was procured by some fraudulent means or deception (R. 814). The Court then concluded that Rubens had signed as a result of deception and misrepresentation, but its conclusion is expressly stated to be based upon certain "reasonable inferences" from the testimony, or lack of it, as to the circumstances of this examination (R. 814), which are not only unwarranted by the record but wholly contrary to Rubens' own testimony.

The Court reached its conclusion in this respect by inferring that Rubens signed Part 2 of the application at the insurance office the day following the examination, and that "it would seem" that he did so on account of the representation by some person that the signature of Frank Obartuch was that of the same person examined by him the day before, from which it followed that Rubens made this certificate as a result of fraud (R. 814).

The Court conceded that the record was silent as to why Rubens left the application with the person examined, and by whom it was presented to Rubens the following day (R. 814). The Court's conclusion based upon such inferences and lack of evidence should be rejected, without

reference to the fact that it is also contrary to Rubens' own testimony, because it violates established rules as to the proof of fraud.

It was the *respondent,* who sought to prove its alleged defense of substitution by Rubens' testimony contradicting his statements in the policy, and who likewise seeks to avoid the application of the Parol Evidence Rule thereto by claiming that Rubens' signature was procured by deception. Surely the burden was upon the respondent to establish clearly the fraud upon which it relied to render this testimony admissible.

See *Farrar* v. *Churchill,* 135 U. S. 609, 615; and *Jones* v. *Simpson,* 116 U. S. 609, 615, where this Court said that fraud is never presumed and that it devolves on him who alleges fraud to prove the same by satisfactory evidence.

Had the facts been as the Court of Appeals presumed them to be concerning the execution of this certificate by Rubens, the respondent could easily have proved such facts and satisfied the burden of proof of the alleged fraud which the law imposes. For if these applications were delivered to the insurance office the day following the examination, if representations were made to Rubens by some person as to the signature thereon being that of the person examined, and if Rubens *actually* executed this certificate on the day following the examination, it was within respondent's power, and was its duty, to show such alleged facts.

The reason why such proof was not made, and why the inferences drawn by the Court of Appeals are incorrect, is shown by the record in Rubens' own testimony. Rubens testified that all of the medical applications made at the examinations, for both Frank Obartuch and his son Henry, were filled out in his (Rubens') handwriting (R. 106, 107). These documents were introduced *as respondent's exhibits,*

and each of them,[1] including Part 2 of the application of Frank Obartuch was dated by Rubens the "11th day of June, 1931" (R. 119). It was conceded that these examinations took place on June 11, 1931. Indeed, the respondent recalled Rubens in rebuttal to clinch this particular date of June 11, 1931 (R. 675). By the testimony of Rubens and respondent's own documentary evidence it is thus conclusively established that Rubens signed his certificate to Part 2 of Frank Obartuch's application on June 11, 1931, the day of the examination, not on the day following said date. The assumption of the Court of Appeals that Rubens signed this certificate the following day is without foundation and its conclusion, predicated upon such assumption, that fraud and deception were practiced on Rubens to induce his signature is unwarranted.

1. The Holding That the Parol Evidence Rule Did Not Render This Testimony Inadmissible Is in Conflict with the Decision of the Fifth Circuit Court of Appeals in the Stewart Case.

The question presented upon the record here is whether Rubens' testimony should have been excluded under the Parol Evidence Rule. In its first opinion the Court of Appeals stated that there were no authorities cited where the precise question was considered as here presented (R. 743). In the petition for rehearing, we called attention to two such cases, *New York Life Ins. Co.* v. *Stewart* (C. C. A. 5), 69 F. (2d) 957, and *Metropolitan Life Ins. Co.* v. *Alterovitz*, 214 Ind. 186, 14 N. E. (2d) 570. In the additional opinion on rehearing the majority of the Court of Appeals stated that these cases were distinguishable for the reason that in such cases the oral testimony contradicting statements in the application was held inadmissible

[1] See Part 3 of application of Frank Obartuch, Def's. Exhibit 4 (R. 119); Part 1 and Part 2 of application for Henry William Obartuch, Def's. Exhibits 6 and 7 (R. 429, 325).

upon grounds of estoppel (R. 815). One of the reasons for asking this Court to grant the petition for certiorari is that the decision of the Court of Appeals in the instant case is in conflict with the decision of the Fifth Circuit Court in the *Stewart* case on the same matter. We therefore direct our attention to that case exclusively, although the decision in the *Alterovitz* case is to the same effect.

In the *Stewart* case the situation was identical with that here presented, except the party offering the oral testimony was the beneficiary rather than the insurance company. The beneficiary sought to avoid the company's defense of false answers by the insured in the medical application (within the contestable period), by offering the testimony of the medical examiner that the insured was not asked the questions for which such false answers were recorded therein. The application signed by the insured contained the usual certificate that the insured had read the answers and that they were each written as by him as made. The District Court had admitted the testimony of the medical examiner over objection of the company and had rendered judgment for the beneficiary.

The Court of Appeals reversed, holding that this testimony was inadmissible by stating (p. 958):

> "The admission of the above referred to testimony of the medical examiner was erroneous, *as that testimony contradicted the statement in the written instrument evidencing the contract sued on to the effect that the answer to each of those questions was made by the insured.*" (Emphasis ours.)

We cannot conceive of any clearer statement to demonstrate that this holding was grounded upon the Parol Evidence Rule and was therefore squarely in point on the "precise question" here presented.[2] Judge Treanor apparently thought such was the case, for he dissented from the opinion of the Court on the petition for rehearing.

2. By no means controlling, but of some interest is the fact that the headnote on this point in the *Stewart* case is keyed to the topic of the Parol Evidence Rule, (See Fourth Decennial Digest, Vol. 13, p. 1003).

The fact that the majority of the Court of Appeals did not recognize the conflict with the decision in the *Stewart* case requires some attention to the purported distinction found by the majority. It is true that the judgment for the beneficiary was reversed by the Court of Appeals on the further ground that the insured was estopped, by acceptance and retention of the policy containing a copy of the application showing the false answers, to show that those answers were not written as made. But such additional ground for the decision does not warrant the conclusion of the Seventh Circuit Court that the testimony of the medical examiner was held inadmissible in the *Stewart* case on the ground of an estoppel against the insured. The ruling on the admissibility of such testimony was distinctly placed upon the fact that it contradicted the statement in the application which constituted part of the policy sued on. The objection was made on the basis of the parol evidence rule and the decision of the Fifth Circuit Court rested upon that ground. The judgment of that Court reversing the District Court and directing a new trial may be said to rest on both grounds, *i. e.*, the estoppel against the insured and the erroneous admission of the parol evidence contradicting the statement in the policy. In such a case, the decision on either ground is the ruling of the Court and cannot be called mere dictum as to either ruling.

Union Pac. R. Co. v. *Mason City & Ft. Dodge R. Co.*, 199 U. S. 160, 166.

Florida C. R. Co. v. *Schutte*, 103 U. S. 118, 143.

We therefore submit that the decision in the instant case conflicts with the decision of the Fifth Circuit Court of Appeals in the *Stewart* case on the same matter and that certiorari should be granted to resolve such conflict.

2. Rubens' Testimony Impeached Documents Introduced in Evidence by Respondent and Should Have Been Excluded Under the Rule in Illinois Precluding a Party Who Introduces Documentary Evidence from Contradicting It.

The testimony of Rubens should also have been excluded for the reason that it directly impeached and contradicted two documents which the respondent had introduced in evidence as its exhibits without qualification. While this reason is not as impelling as the application of the Parol Evidence Rule, as the rule that a party may not impeach its own documentary evidence is not of universal application (23 Corpus Juris, § 1793, p. 51), it is the unquestioned rule of the Illinois courts. Jurisdiction of the District Court in this case rested exclusively on diversity of citizenship, the ground for removal from the Illinois state court, and under the Rules of Decision Act (Title 28, U. S. C. § 725) and the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the courts below should have applied the law of Illinois as announced by its highest court.

The respondent has not disputed that the decisions of the Supreme Court of Illinois preclude the impeachment of documentary evidence by the party introducing it. That Court has not only held that parol testimony or other evidence which tends to impeach or contradict documentary evidence is inadmissible when offered by the party introducing such documents (*Schneider* v. *Sulzer*, 212 Ill. 87 at page 95; *Cuneo Press Co.* v. *Industrial Commission*, 341 Ill. 569 at page 572) but in the case of *Nolan* v. *Barnes*, 268 Ill. 515, the Court held that an order of a probate court finding heirship was conclusive upon the party offering it in evidence, although it was said that otherwise the findings therein would be of no probative force because the probate court had no jurisdiction to enter it.

Respondent attempted to avoid the application of this rule to the testimony of Rubens by arguing that *its* Exhibit 5, which is Part 2 of the application containing Rubens' certificate directly contrary to his testimony, was not in actuality *its* exhibit because (a) a photostatic copy of the application had been introduced by the petitioner as a part of the policies sued on and (b) respondent was only interested in offering Part 3 of the application which was on the reverse side of Part 2.

A ready answer to this contention is the fact that the record shows that the respondent offered and the Court received Part 2 of the application in evidence as Defendant's (Respondent's) Exhibit 5 (R. 115, 118-119). Moreover, the Court of Appeals, while disregarding the application of the rule contended for, expressly stated that "Part 2 was also offered by the defendant and received in evidence as its Exhibit 5" (R. 743).

Rubens' testimony, that the signature of the person examined by him was not attached to Part 2 of the application in his presence, likewise impeached and contradicted his statements in Part 3, as to which there can be no quibbling over the fact that it was respondent's exhibit. In that document Rubens reported to his company that he was satisfied that the person he examined was the person represented in the application and that he had no knowledge of any other facts which, if known, would affect the decision in the case (R. 116, 117). The alleged fact that he did not obtain the applicant's signature but rather left these parts of the application with the person examined, so glibly testified to by Rubens, could not be other than an impeachment of his own statement in the report introduced by respondent.

The Court of Appeals failed to consider the application of this rule of the Illinois courts in either of its opinions, although the point was raised and fully argued by both parties. We submit that the Court was in error in failing

to give recognition to the law of the state under which Rubens' testimony should have been held incompetent.

The elimination of Rubens' testimony on either of the grounds urged herein must necessarily result in a reversal of the case for the entry of judgment for this petitioner, for the fact that Frank Obartuch signed this application at the examination, as stated by the respondent's examiner therein, would be conclusive of the fact that he was the person examined by Rubens.

B. Under the Law of Illinois, the Defense of an Alleged Fraudulent Substitution of a Person Other Than the Insured at the Medical Examination Was Precluded by the Incontestable Clause.

It cannot be disputed upon the record in this case that Frank Obartuch, the insured, signed the application upon which the policies were issued. Respondent had alleged in its answer that either some other person signed or that Frank Obartuch did not knowingly sign the application. At the trial, respondent's counsel waived this defense and stated repeatedly that its sole defense was that a person other than Frank Obartuch submitted to the medical examination (R. 64-66), and that it was immaterial to the defense of fraudulent substitution whether Frank Obartuch signed or whether he knew what he was signing (R. 66).

When the issues were so limited to the question of the alleged fraudulent substitution at the medical examination, the petitioner renewed her motion for judgment (R. 102), but that motion and similar motions made during and at the conclusion of the trial were denied by the Court, the Court stating that the respondent was entitled to that defense (R. 104).

The question presented was whether the incontestable clause in the policies (R. 73) barred the defense of fraud

in procuring the policies by the alleged substitution at the medical examination. The decision of that question was dependent on the law of Illinois. That such was the question presented, and that the question was decided without reference to any other factor, such as the alleged lack of knowledge of Frank Obartuch that he signed this application, is shown by the refusal of the District Court to hold Conclusion of Law No. 2 requested by petitioner to the effect that it was the law of Illinois that the incontestable clause barred the defense of fraud, including the defense of substitution of someone else for the insured at the medical examination (R. 703, 704), and by the holding of that Court to the contrary in Conclusion of Law No. 5 submitted by respondent (R. 713).

The Court of Appeals sustained the District Court's refusal to apply the law of Illinois, predicating its decision on the ground that the defense was fraud which rendered the contract void *ab initio* (R. 742). The Court cited several cases where a similar conclusion was reached, but disregarded the important fact that in all of the cases relied upon, the imposter, who took the medical examination, also signed the application in the name of the supposed insured. The decisions in cases, such as *Ludwinska* v. *John Hancock Mutual Life Ins. Co.*, 317 Pa. 577, 178 Atl. 28, and *Maslin* v. *Columbian Nat. Life Ins. Co.*, 3 F. Supp. 368, that the incontestable clause did not apply, were based upon the fact that there was no contract with the person whose name was signed to the application by an imposter, but that if a contract was made it was with the person who actually signed the application in the supposed insured's name.

The instant case is clearly distinguishable for the insured named in the policies, Frank Obartuch, signed the application. He signed not only Parts 1 and 2 of the application on the date of the examination, but also two

amendments on separate dates in the two months following. The finding of the courts below that he signed these documents without knowledge of that fact, was on a matter of defense expressly waived by respondent, through its counsel, at the trial. The case should have been decided upon the issue tendered by the respondent. To hold, under the circumstances shown by this record as to such waiver, that a case may be tried upon the single issue tendered and then after the trial to enter findings on the defense waived by the respondent, is to encourage the violation of engagements solemnly made in a court of law.

The law of Illinois as announced by its highest court is that the incontestable clause of such policies bars the insurer from making any defense against the policies after the expiration of the contestable period, and that even fraud in procuring the policy is not available as a defense to avoid liability thereon.

Royal Circle v. *Achterrath*, 204 Ill. 549, 559.
Ramsey v. *Old Colony Ins. Co.*, 297 Ill. 592, 595.
Powell v. *Mutual Life Ins. Co.*, 313 Ill. 161, 165.

The Seventh Circuit Court of Appeals has applied such law of Illinois in the following cases:

State Mutual Life Assurance Co. v. *Stapp*, 72 F. (2d) 142, 146.
Service Life Ins. Co. v. *Weinberg*, 81 F. (2d) 359.

The conclusion of the Court of Appeals in the instant case that the fraudulent substitution at the medical examination rendered the policies void *ab initio* and that therefore the incontestable clause was inapplicable, does not rest on a rational basis. There is no degree of fraud recognized in these cases. (*Mutual Life Ins. Co.* v. *New*, 125 La. 41, 51 So. 61.) The Seventh Circuit Court of Appeals held in the *Stapp* case that the fraudulent intent of the insured to commit suicide after the contestable period had

expired, did not render the policy void *ab initio,* and was not a defense available to the insurer, saying (p. 145):

> "We do not perceive why such a fraud is any more potent in avoiding a policy than a fraud of any other nature perpetrated by the insured on the insurer to procure the policy, nor why it is any more definitely contrary to public policy than other frauds."

Even if it is held that it was proper to make a finding on an issue expressly waived by the respondent, and assuming therefore that Frank Obartuch signed this application without knowledge that he was applying for these policies, under the circumstances shown by the evidence and admitted by the respondent, the respondent is estopped to claim fraudulent procurement under Illinois law. In *Guardian Mutual Life Insurance Co.* v. *Hogan,* 80 Ill. 35, a son signed his father's name to an application without the father's knowledge or consent. The agent of the insurer who solicited the policy knew that the application had been signed by son. The Court held that the application was not a fraud on the insurer, saying (p. 40):

> "The whole conduct and dealing of the agents with Patrick Hogan (the son) throughout the entire affair, in all its stages, *show too much of privity and knowledge on the part of the agents in respect to the actual facts* (that the father did not know of or consent to the application), to expose the transaction to this implication." (Emphasis and parenthetical remarks ours.)

In the instant case Frank Obartuch signed the application on three different dates. The respondent's agent, Friedman, who witnessed Frank Obartuch's signatures on Part 1 of the application and on the two amendments subsequently executed by Frank Obartuch, must have known that Frank Obartuch did not knowingly sign, if such were the fact, for the respondent charged in its answer (R. 10), and Rubens testified (R. 132), that Friedman introduced Rubens to the person examined by him as Frank Obartuch.

The law of Illinois precluding the defense of fraud was binding upon the courts below, and their refusal to apply

such law is error under the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

Conclusion.

The questions presented are such as suggest the necessity of the exercise of the supervisory powers of this Court. The decision here conflicts with that of the Fifth Circuit Court of Appeals in the *Stewart* case. The courts below have refused to apply the law of the State of Illinois in this case, where jurisdiction of the Federal court rests solely upon diversity of citizenship.

The case presents issues of importance generally in cases involving life insurance policies, which should be authoritatively determined, as many such cases are removed to the Federal courts. The consequences of a decision such as that rendered by the courts below are far reaching in effect. The courts below hold that, even though an application bears the genuine signature of the person insured, witnessed and certified to by the insurer's agent and medical examiner, the insurer may defend and defeat a recovery on the policy issued on such application, if such medical examiner is willing to testify that the insured, whose signature was declared by such examiner in the application to have been attached thereto in his presence, was not in fact the person he examined. Under such circumstances, no life insurance policy is safe from contest at any time and the incontestable clause, designed to protect beneficiaries from contests where they are placed at a disadvantage, and to prevent dishonest contests, is thus effectually destroyed.

We respectfully submit that the petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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